



**National  
Urban League**

*Empowering Communities.  
Changing Lives.*

April 18, 2018

Chairman Ajit V. Pai  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

RE: Reply Comments of the National Urban League- MB Docket No. 17-318: Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule

Dear Chairman Pai:

The National Urban League (NUL) is an historic civil rights organization dedicated to economic empowerment in order to elevate the standard of living in historically underserved urban communities. NUL represents 90 affiliates serving 300 communities, in 36 states and the District of Columbia, with the mission to enable African Americans to secure economic self-reliance, parity, power and civil rights. The current proceeding directly involves issues in which the Urban League has a significant interest, primarily economic opportunity, diversity, and fairness. National Television Multiple Ownership Rules directly impact the communities NUL serves, and determines the quality and diversity of information and programming our communities receive.

According to recent Nielsen research, the number of broadcast-only homes are increasing, not decreasing, with a 12 percent rise over the last year.<sup>1</sup> Importantly, African Americans rely solely on over the air broadcasting more than most other groups, with numbers including more than 3.3 million African American homes, representing 7.7 million African Americans in total.<sup>2</sup> In cities like Baltimore, Memphis, and Norfolk, broadcast television penetration in African American homes is clearly demonstrated, where African American homes make up 49 percent, 54 percent, and 45 percent respectively of all broadcast-only homes.<sup>3</sup>

---

<sup>1</sup> The Nielsen Company. The Nielsen Total Audience Report, Q3 2016, December, 2016.

<sup>2</sup> GfK-Knowledge Networks, "Home Technology Monitor Survey," Spring 2016.

<sup>3</sup> The Nielsen Company, Nielsen Local Television Market Universe Estimates: Black/African American

The Federal Communications Commission (FCC or Commission) currently seeks to amend application of its ownership rules, specifically the VHF and UHF Audience Caps. The Commission further requests comment on whether Congress has granted the FCC authority to amend the caps *sua sponte*, or whether changes are limited by statute, solely to congressional action.

## Purpose of Rules and Current Markets

The purpose of the ownership rules is to prevent what the commission and its predecessor agency have always sought to avoid—the misuse of licensed spectrum to unduly dictate an owner’s preferred point of view, absent the availability of diversity and localism.<sup>4</sup> It has long been decided that diversity of views via the airwaves serves the public interest.<sup>5</sup> The approach to date has been to manage broadcast markets through ownership rules. The regulations operate under the presumption that through the construct of prescribed ownership, we can ensure the availability of divergent and contrasting voices, and as a result successfully protect against spectrum misuse.<sup>6</sup>

Over the years, the airwaves have become more complex. In 1934, the primary focus was about information flowing through the radio and television spectrums. Today, information flows not just through broadcast spectrum, but also wireless spectrum, used by mobile devices and content providers to inform the public debate, and facilitate information and opinions into homes, cars, workplaces, public parks, and nearly every place a signal can be received.

Moreover, the number of market participants has increased significantly.<sup>7</sup> Today’s broadcasters now compete against companies like Netflix, Amazon, satellite, cable, Facebook and others, most of whom offer products previously only available through broadcast television. These companies equal well over a trillion dollars in market capitalization, and have a reach that exceeds broadcasting as we once knew it— particularly when considering the ability of these companies to access consumers in the home and beyond. Television station groups on the other hand are much smaller in size, yet necessarily need to compete within the same complex market.<sup>8</sup>

Many of these companies, with a few exceptions, compete for the same advertisers and use programming, such as news, sports, and entertainment to attract consumers and viewers. Media and technology companies that have the ability to achieve scale, attract capital, and build robust operations, have a clear competitive advantage. Ironically, it is possible that further restricting local broadcasters could result in greater erosion of diversity of voices and localism.

However, deregulation is not necessarily the solution, and may well pose equal or greater threats. For the National Urban League, diversity of ownership and diversity of views and localism are paramount to its 90

---

<sup>4</sup> See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969), “It is the purpose of the First Amendment to preserve an uninhibited market-place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.”

<sup>5</sup> See Communications Act of 1934, 47 U.S.C. §§ 151-162.

<sup>6</sup> See *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d. Cir. 2004).

<sup>7</sup> <https://www.recode.net/2018/1/23/16905844/media-landscape-verizon-amazon-comcast-disney-fox-relationships-chart>, Recode (April 3, 2018).

<sup>8</sup> <http://www.macrotrends.net/stocks/industry/32/> (see leading US local broadcast groups, *Sinclair*, *Nexstar Media*, *Tegna*, *E.W. Scripps*).

affiliates serving 300 communities, in 36 states and the District of Columbia. Simply untying the markets isn't recommended. That said, there exists a strong argument for developing a new regulatory framework to guide existing realities—a framework that permits market competition for consumers and advertisers, while ensuring certain walls are in place to ensure diversity of ownership and of views and voices at the local level. The solution will not be achieved in a single rulemaking—particularly when considering that current rules may not have contemplated existing realities.

Antitrust laws are often an effective control of market power, so these restrictions should be maintained and strongly enforced. However, it is still possible to have an environment where market power abuses are absent, yet diversity and localism are still destroyed. Keeping television broadcasters small, so as to allow only local voices to dominate, would be ideal but has real challenges due to competition and an inability to attract capital necessary to build competitive diverse programming and voices. That said, the Commission should seriously consider whether a construct could evolve that allows for competitive scale but significantly limits negative impacts on diversity and localism.

Rules governing ownership structures should also incentivize investments in women and minority-owned broadcasting, and additionally incentivize interaction with these growing enterprises. While we should not penalize the investing larger entity for its affiliation in furtherance of diversity, the affiliation must be genuine and minority or female ownership authentic. Additionally, as majority owned entities seek to expand and grow to remain competitive, the FCC must encourage investments in and affiliation with diverse ownership.

## Audience Caps

The Commission additionally seeks comment on whether it has authority to amend the Audience Caps, or whether action from Congress is required.<sup>9</sup> Commenters have opined on both sides of the question, each offering sound arguments.<sup>10</sup> The courts have not been silent on this issue, and provide *some* guidance.

---

<sup>9</sup> See Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, MB Docket No. 17-318, Notice of Proposed Rulemaking, 32 FCC (released Dec. 18, 2017).

<sup>10</sup> Comments of the Attorneys General of the States of Illinois, Iowa, Maine, Massachusetts, Pennsylvania, Rhode Island, and Virginia, "To the extent there was any ambiguity regarding Congress's role as the sole decider regarding Cap-setting, that ambiguity disappeared in 2004, MB Docket 17-318 (February 26, 2018); Comments of Nextstar Broadcasting, Inc., "The Communications Act empowers the Commission to modify or eliminate its rules, including the national cap rule," MB Docket 17-318 (March 19, 2018); Comments of the ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates, "The Affiliates Associations' comments assume that the Commission has the necessary regulatory authority to modify the national audience reach cap and the UHF discount and intends to consider revision of the cap in this proceeding," Footnote 7, MB Docket 17-318 (March 19, 2018); Comments of The Leadership Conference on Civil and Human Rights, "The Commission should not change the national ownership cap because Congress set the current national ownership cap in 2004 via statute, and the Commission does not have authority to change it now," MB Docket 17-318 (March 19, 2018); Comments of the National Association of Broadcasters, "As an initial matter, NAB agrees with the FCC that it has statutory authority to modify or eliminate the national TV cap and associated calculation methodology, MB Docket 17-318 (March 19, 2018).

Courts, on two occasions have opined that even though Congress has directed in statute a specific cap, “[s]ection 202(h) itself requires the Commission to determine whether its ownership rules...are necessary in the public interest. Thus, the statute imposed upon the Commission a duty to examine critically the new 35% NTSO Rule... [and] to defer to the Congress’s choice of 35% as of 1996 is to default upon this ongoing duty.”<sup>11</sup> The court revisited the issue later when parties suggested “the court erred in failing to defer to the decision of Congress to set the initial nationwide ownership cap at 35%.”<sup>12</sup> In response the court opined that “the panel already considered and rejected that argument.”<sup>13</sup> The court continued, “[h]ad the Congress wished to insulate the NTSO Rule from review under section 202(h), it need only have enshrined the 35% cap in the statute itself.”<sup>14</sup>

However, in 2004, as part of the Consolidated Appropriations Act, Congress again set the cap, but to 39% and added at the end of 202(h) that the “subsection does not apply to any rules relating to the 39 percent national audience reach limitation...”<sup>15</sup> The effect of the provision is to remove the audience cap from the Commission’s periodic review requirements, in response to the D.C. Circuit’s 2002 ruling.

That said, although many would like to see the caps remain, and others, expansion or even greater restrictions, most would agree the issue is ripe for discussion and exploration, in that the markets have significantly morphed. The real issue, at least for the National Urban League, is how do we best protect diversity and localism. It’s not clear that either is necessarily preserved in today’s *or tomorrow’s* market if the caps remain at 39 percent or set lower. Key to the equation is the ability of television broadcasting as a business to compete, and broadcasters’ ability to develop programming and provide information within their local communities. Indeed, the question isn’t whether an owner’s reach exceeds 39 percent (presuming rules of market power are not violated), but whether local stations within that owner’s group have appropriate incentives, authority, and right, to choose localism over programming sent from above. The economic analytics to balance incentives for station owners, networks, and station groups involves consideration of scale for the larger owner, from which all parties benefit. However, the ability of the local station to inform the impact of scale, through inclusion of diversity and localism must be preserved.

## Conclusion

A review of the Audience Caps is necessary and timely, and should occur based on changes in the current marketplace. That said, any changes should be made in favor of promoting diversity and localism— with genuine examination of whether to do nothing, or to reduce the caps, would be counterintuitive to public policy objectives.

African Americans have a heavier reliance on broadcast television than many other groups. The ability of our communities to receive free over-the-air television, representative of local communities and inclusive of diverse voices, is essential. Additionally, should the caps be expanded, whether by the Commission, Congress, or the courts, expansion necessarily must be tied to incentivizing and increasing ownership opportunities for

---

<sup>11</sup> Fox Television Stations Inc. v. FCC, 280 F.3d 1027, 1044 (D.C. Cir 2002).

<sup>12</sup> Fox Television Stations Inc. v. FCC, 293 F.3d 537, 540 (D.C. Cir 2002).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> CAA, Pub. L. No. 108-199, § 629(3), 118 Stat. 3, 99 <sup>[L]</sup><sub>SEP</sub>

women and minorities. The Commission's proposed incubator program is an excellent start to increase ownership among minorities and women, however, additional market incentives to invest in these businesses must also be developed. The Urban League looks forward to working more closely with the Commission to identify recommended policy incentives, and best paths forward related to the ownership rules.

Sincerely,

A handwritten signature in blue ink, appearing to read "marc morial", with a stylized flourish at the end.

Marc H. Morial  
President and Chief Executive Officer  
National Urban League

cc: Commissioner Mignon Clyburn  
Commissioner Michael O'Rielly  
Commissioner Brendan Carr  
Commissioner Jessica Rosenworcel